Fadzil bin Harun v Mohd Azrul bin Md Ariffin & Anor

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO C-04–79–03 OF 2014
ZAWAWI SALLEH, IDRUS HARUN AND PRASAD ABRAHAM JJCA
19 JANUARY 2015

Damages — Apportionment — Negligence — Road accident — Collision between motorcar and motorcycle — Findings of liability — Contribution of negligence — Whether proportionate — Appeal against decision of sessions court judge

The first and second plaintiffs filed a claim for damages arising from a road accident between the first plaintiff's motorcycle and the defendant's motorcar. The first plaintiff was the rider of the motorcycle and the second plaintiff was seated as the pillion rider. The defendant was the driver of the motorcar and the defendant filed an amended defence and counterclaim against the first plaintiff and, inter alia, sought to counterclaim from the first plaintiff the damages to the extent of the first plaintiff contribution in the accident payable to the second plaintiff who was the pillion rider. After a full trial, the sessions court judge ('SCJ') decided and apportioned liability as: the first plaintiff 70% liability and the defendant 30% liability to the second plaintiff. The defendant filed a counterclaim based on s 10 and in particular sub-s 10(1)(c) of the Civil Law Act 1956 and the SCJ dismissed the defendant's counterclaim. This was affirmed by the High Court judge. Hence, the present appeal by the defendant against the refusal of the High Court judge to allow a plea of contribution or indemnity where the defendant sought 70% contribution in terms of damages that the defendant had to pay out to the second plaintiff from the first plaintiff.

Held, allowing the appeal in part:

(1) This was not a claim for apportionment of liability but a claim for contribution from the first plaintiff who was a joint tortfeasor. The defendant was entitled to pursue its rights of contribution or indemnity against the first plaintiff up to 70% of damages awarded against the second plaintiff. The quantum of damages was not being disputed. The judge erred in law in dismissing the counterclaim of the defendant. In a case of an action of contribution, the appellant is entitled to rely on the quantum of damages already assessed and not in dispute and proceed to claim for contribution based on the ratio of liability already ordered by the court. There would be no necessity for any evidence to be led in this regard (see paras 7 & 9).

[Bahasa Malaysia summary

Plaintif-plaintif pertama dan kedua memfailkan tuntutan untuk ganti rugi yang berbangkit daripada kemalangan jalan raya antara motosikal plaintif dan motokar defendan. Plaintif pertama adalah penunggang motosikal tersebut dan plaintif kedua duduk sebagai pembonceng. Defendan adalah pemandu motokar dan defendan memfailkan pembelaan yang dipinda dan tuntutan balas terhadap plaintif pertama dan, antara lain, memohon untuk menuntut balas daripada plaintif pertama ganti rugi sehingga sumbangan plaintif pertama dalam kemalangan tersebut dibayar kepada plaintif kedua yang mana adalah pembonceng. Selepas perbicaraan penuh, hakim mahkamah sesyen ('HMS') memutuskan dan membahagikan liabiliti sebagai: plaintif pertama 70% liabiliti dan defendan 30% liabiliti kepada plaintif kedua. Defendan memfailkan tuntutan balas berdasarkan s 10 dan terutamanya sub-s 10(1)(c) Akta Undang-Undang Sivil 1956 dan HMS menolak tuntutan balas defendan. Ini disahkan oleh hakim Mahkamah Tinggi. Maka, rayuan ini oleh defendan terhadap penolakan Mahkamah Tinggi untuk membenarkan pli sumbangan atau bayaran yang mana defendan memohon sumbangan sebanyak 70% dalam ganti rugi yang defendan perlu bayar kepada plaintif kedua daripada plaintif pertama.

Diputuskan, membenarkan sebahagian rayuan:

(1) Ini bukan tuntutan untuk pembahagian liabiliti tetapi tuntutan untuk sumbangan daripada plaintif pertama yang mana adalah tortfeasor bersama. Defendan berhak untuk mendapatkan haknya terhadap sumbangan atau bayaran terhadap plaintif pertama sehingga 70% ganti rugi diawardkan terhadap plaintif kedua. Kuantum ganti rugi tidak dipertikaikan. Hakim tersilap dari segi undang-undang dalam menolak tuntutan balas defendan. Dalam kes tindakan terhadap sumbangan, perayu adalah berhak untuk bergantung atas kuantum ganti rugi yang telah ditaksirkan dan bukan dalam pertikaian dan meneruskan untuk menuntut untuk sumbangan berdasarkan atas ratio liabiliti yang telah diperintahkan oleh mahkamah. Tidak perlu untuk apa-apa keterangan untuk dikemukakan dalam perkara ini (lihat perenggan 7 & 9).]

Cases referred to

Chan Kit Hong & Anor v Jayakumar & Anor [1984] 2 MLJ 271, FC (refd)
Malaysian National Insurance Sdn Bhd v Lim Tiok [1997] 2 MLJ 165, SC (refd)

Legislation referred to

Civil Law Act 1956 s 10, 10(1)(c)
Rules of the High Court 1980 O 16 r 8(1)(a)

Appeal from: Civil No 12–130 of 2009 (High Court, Kuantan)

Jagjit Singh (Jagjit Singh & Co) for the appellant.
Harinder Singh (Ravi Moorthi Noriza Mala & Partners) for the respondents.

Prasad Abraham JCA (delivering judgment of the court):

[1] This is an appeal by the appellant against the decision of the High Court dismissing the apellant's appeal on 5 October 2011. For ease of reference, we will refer to the appellant as the defendant and the first and second respondents as the first and second plaintiffs.

BRIEF FACTS RELEVANT TO THIS APPEAL

[2] The first and second plaintiffs filed a claim for damages arising from a road accident which occurred on 8 April 2002 at KM196.5 Jalan Johor Bahru-Kuantan between the first plaintiff's motorcycle registration No CAH 4370 and the defendant's motorcar registration No BDR 9715. The first plaintiff was the rider of the motorcycle and the second plaintiff was seated as the pillion rider. The defendant was the driver of the motorcar.

[3] The defendant filed an amended defence and counterclaim against the first plaintiff and, inter alia, sought to counterclaim from the first plaintiff the damages to the extent of the first plaintiff contribution in the accident payable to the second plaintiff who was the pillion rider. After a full trial, the learned sessions court judge decided and apportioned liability as follows:

(a) the first plaintiff — 70% liability; and

(b) the defendant — 30% liability to the second plaintiff.

[4] The defendant had filed a counterclaim based on s 10 and in particular sub-s 10(1)(c) of the Civil Law Act 1956 ('Act 67') and the learned sessions court judge dismissed the counterclaim of the defendant. The learned High Court judge on 5 October 2011 also dismissed the defendant's appeal (see the order at pp 4–5 of the appeal record Part A). Hence, the defendant filed this appeal.

[5] The defendant has abandoned its grounds of appeal in the memorandum of appeal (see at pp 1–3 of the appeal record Part A), save and except for grounds 1 and 2 which are essentially on the dismissal of the counterclaim. The defendant adopted the procedure set out in O 16 r 8(1)(a) of the Rules of the High Court 1980 to claim a contribution and/or indemnity against the first plaintiff. This procedure had been set out in the case of *Chan Kit Hong & Anor v Jayakumar & Anor* [1984] 2 MLJ 271.

[6] The finding of liability in this case stemmed from the ruling of the sessions court that the first plaintiff was 70% liable to the second plaintiff and the defendant was 30% liable. The defendant now appeals against the refusal of the High Court judge to allow a plea of contribution or indemnity wherein the defendant seeks 70% contribution in term of damages that the defendant has to pay out to the second plaintiff from the first plaintiff.

[7] This is not a claim for apportionment of liability but a claim for contribution from the first plaintiff who is a joint tortfeasor. We now set out s 10 of (Act 67) in full:

> 10(1) Where damage is suffered by any person as a result of a tort (whether a crime or not) —
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> (a) judgment recovered against any tort-feasor liable in respect of that damage shall not be a bar to an action against any other person who would, if sued, have been liable as a joint tort-feasor in respect of the damage;
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> (b) if more than one action is brought in respect of that damage by or on behalf of the person by whom it was suffered, or for the benefit of the estate, or of the wife, husband, parent or child of that person, against tort-feasors liable in respect of the damage (whether as joint tort-feasors or otherwise) the sums recoverable under the judgements given in those actions by way of damages shall not in the aggregate exceed the amount of the damages awarded by the judgement first given; and in any of those *actions, other than that in which judgment is first given, the plaintiff shall not be entitled to costs unless the Court is of opinion that there was reasonable ground for bringing the action*;
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> (c) *any tort-feasor liable in respect of that damage may recover contribution from any other tort-feasor who is, or would if sued have been, liable in respect of the same damage, whether as a joint tort-feasor or otherwise, so, however, that no person shall be entitled to recover contribution under this section form any person entitled to be indemnified by him in respect of the liability in respect of which the contribution is sought*.
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> (2) In any proceedings for contribution under this section the amount of the contribution recoverable from any person shall be such as may be found by the Court to be just and equitable having regard to the extent of that person's responsibility for the damage, and the Court shall have power to exempt any person from liability to make contribution, or to direct that the contribution to be recovered from any person shall amount to a complete indemnity.
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> (3) For the purpose of this section —
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> (a) the expressions 'parent' and 'child' have the same meaning as they have for the purpose of section 7; and
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> (b) the reference in subsection (1) (b) to 'the judgement first given' shall, in a case where that judgment is reversed on appeal, be construed as a

reference to the judgment first given which is not so reversed and, in a case where a judgment is varied on appeal be construed as a reference to that judgement as so varied.

(4) Nothing in this section shall —

(a) affect any criminal proceedings against any person in respect of any wrongful act; or

(b) render enforceable any agreement for indemnity which would not have been enforceable if this section had not been enacted. (Emphasis added.)

[8] The court also refers to the decision of Supreme Court in the case of *Malaysian National Insurance Sdn Bhd v Lim Tiok* [1997] 2 MLJ 165 in which the facts of the case are very similar to ours. We refer to the judgment of His Lordship Edgar Joseph Jr at p 188 of the report which we now set out:

> Bearing in mind what has just been said, it will be seen that sub-ss (1) and (2) of s 10 of the CLA are concerned with the reformation of procedural law in proceedings against and contribution between joint or several tortfeasors and it is difficult to see what relevance they have to the question of the extent of the liability of insurers against third party risks which is an entirely separate issue depending upon the construction of the relevant compulsory third party insurance legislation and the terms of the relevant contract of insurance. In so far as third party liability under the Ordinance is concerned, injured third parties in seeking to enforce satisfaction of a judgment obtained against insurers by virtue of s 80(1) of the Ordinance will not be affected by any order as to apportionment of responsibility between tortfeasors, whether joint or independent. *However, if a tortfeasor is called upon to pay the full amount in the first instance, his insurer will, of course pay the full amount but his insurer will be subrogated to his right of contribution and should be left ultimately only bearing his due proportion*. (Emphasis added.)

[9] In the light of that, it is our finding that the defendant in this case is entitled to pursue its rights of contribution or indemnity against the first plaintiff up to 70% of damages awarded against the second plaintiff. The quantum of damages is not being disputed, we therefore are of the view the learned judge erred in law in dismissing the counterclaim of the defendant. In a case of an action of contribution, the appellant is entitled to rely on the quantum of damages already assessed and not in dispute and proceed to claim for contribution based on the ratio of liability already ordered by the court. There would be no necessity for any evidence to be led in this regard.

[10] In the upshot, the appeal is allowed purely in relation to grounds first and second of the memorandum of appeal and the order the High Court is set aside to that extent with costs.

Appeal allowed in part.

Reported by Afiq Mohamad Noor